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# LIMITATIONS OF ACTIONS IN CONVERSION AND DETINUE

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# CHAPTER 1

# INTRODUCTION

This project originates from the Manitoba Law Reform Commission's *Limitations* report, published in October 2010.[1] In the *Limitations* report, the Commission identified what it saw as the primary areas of Manitoba limitations law requiring modernization, and the best ways of accomplishing that goal. The Commission recommended the abolition of various categories of claims and favoured a single, basic two-year limitation from the date of discovery, applicable to all claims unless they are otherwise dealt with in the new Act. The Commission also recommended an ultimate 15-year limitation period running from the day on which the act or omission on which the claim is based took place, beyond which no claim may be brought. This system, designed around a single basic two-year limitation period and a 15-year ultimate limitation period, will be referred to in this report as the "standard limitation regime".

Recommendations were also made for special limitations where it was appropriate to provide certain exemptions to the standard limitation regime. In this respect, a special limitation period was considered for the wrongful interference with another person's personal property giving rise to the torts of conversion and detinue. Ultimately, the Commission concluded that broader reforms were needed to rationalize the substantive law of conversion and detinue in Manitoba. Accordingly, no recommendations regarding conversion and detinue were made in the *Limitations* report, and the intention was to issue a separate report with recommendations for reform to the law of conversion and detinue as a whole.

Several aspects of the law of conversion and detinue have attracted the attention of law reformers. Foremost among these are the rules governing damages in conversion, an overview of which is provided in Chapter 2 of this report. On review of the jurisprudence in Manitoba and other Canadian provinces, however, the Commission has found that the general rules relating to conversion and detinue, while complicated, do not appear to create significant inconvenience to the parties or to judges deciding cases. The Commission is wary of recommending complicated legislative changes which may create difficulties of interpretation, particularly in an area of law which continues to offer a broad and flexible range of remedies in respect of interference with personal property.

For these reasons, the scope of this report has been narrowed from that originally contemplated in the *Limitations* report of October 2010. The Commission's focus in this report will be to make recommendations solely in respect of limitations of actions in conversion and detinue. The Commission prefers to complete its recommendations for a new *Limitations Act* before undertaking a comprehensive review of the law of conversion and detinue.

By their nature, actions in conversion and detinue give rise to unique problems in respect of limitations, including: the application of limitation periods in cases of successive conversions or detentions; the protection of innocent purchasers of converted or detained goods from

[1] Manitoba Law Reform Commission, *Limitations* (Report No. 123, 2010).

exposure to ongoing liability; the effect of the expiry of a limitation period on title to the converted or detained goods; the interaction of limitation periods and theft-related conversions; and, the difficulties created by concurrent actions in conversion and detinue.

Several law reform agencies have addressed some or all of these issues, and most modern limitations legislation in Canada attempts to clarify the law in this area.[2] This report will make recommendations to address these concerns, and to integrate the law of limitations of actions in conversion and detinue with the standard limitation regime recommended in the Commission's *Limitations* report.

In making its recommendations, the Commission is mindful of the philosophy underlying limitations legislation in general, summarized in the *Limitations* report as including factors of certainty, evidentiary soundness, diligence on the part of the parties, and economic predictability.[3]

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[2] *Ibid.* at 9. The Manitoba Law Reform Commission *Limitations* report describes modern limitations legislation as providing for a two-year basic limitation period and a longer ultimate limitation period. The term "modern limitations legislation" is used in the same sense in this report. The limitations statutes of Alberta, Saskatchewan, Ontario and New Brunswick are examples of modern limitations legislation in Canada.

[3] *Ibid.* at 3.

## CHAPTER 2

## CHARACTERISTICS OF CONVERSION AND DETINUE

Before turning to specific questions concerning limitations, this chapter will review the principal theoretical characteristics of the torts of conversion and detinue,[1] the extent to which they overlap and the ways in which they differ. This is not intended to be an exhaustive description of the torts, but instead an overview of the features most relevant to limitations issues. This review should assist in understanding how the torts' characteristics have contributed to the particular difficulties associated with limitations of actions in conversion and detinue.

### A. CONVERSION

There are several common law torts dealing with wrongful interference with interests in personal property, the principal ones being conversion, detinue and trespass. The torts are of ancient origin and many of their features can be traced directly back to the procedural requirements of forms of action developed in the middle ages.

Trespass to chattels protects a person's possession of chattels against wrongful direct interferences.[2] Detinue is the wrongful detention of chattel, and will be discussed in more detail below.

Conversion is the broadest and most versatile of these torts. It is "an expansionary and flexible concept that now encompasses many situations that, at an earlier time, were the predominant preserve of trespass to chattels or detinue."[3] Despite the significant overlap between conversion, detinue and trespass to chattels, each remains a discrete tort and a recognized cause of action in Canadian law.

The authorities offer several definitions of conversion. The leading Canadian case is the Supreme Court of Canada's decision in *Boma Manufacturing Ltd. v. CIBC* which defines conversion in the following manner: "The tort of conversion involves the wrongful interference with the goods of another such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession."[4] *Remedies in Torts* offers a slight variation on the definition: "Conversion consists of the wrongful dealing with a chattel in a manner inconsistent with another person's right to its use and possession."[5]

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[1] Some sources note that the formal characteristics of the torts are not always observed in modern practice. See for example, Law Reform Commission of British Columbia, *Report on Wrongful Interference with Goods* (Report No. 127, 1992) at 44-45.
[2] L.N. Klar, *Tort Law*, 4th ed.( Toronto: Thomson Carswell, 2008) at 87.
[3] Philip Osborne, *The Law of Torts*, 4th ed. (Toronto: Irwin Law, 2011) at 308.
[4] *Boma Manufacturing Ltd. v. CIBC*,[1996] 3 S.C.R. 727 at para. 31.
[5] Rainaldi, ed., *Remedies in Tort*, vol.1 (Toronto: Carswell, 1987) at 4-10.5.

While acknowledging the difficulties involved in framing a precise definition of conversion, the House of Lords provided the following summary of the tort's principal features, in *Kuwait Airways Corporation v Iraqi Airways Company and others*:

> a) the defendant's conduct is inconsistent with the rights of the owner or other person entitled to possession;
> b) the defendant's conduct is deliberate, and;
> c) the conduct is so extensive an encroachment on the rights of the owner or other person entitled to possession as to exclude them from use and possession of the goods.[6]

To bring an action in conversion, the claimant must have been in possession, or had a right to immediate possession, of the chattel at the time of the conversion.[7] Notwithstanding the reference to an owner's right of possession in many judicial and academic definitions, conversion is not directly concerned with ownership, but instead protects rights of possession of chattels.[8] This is evident from the rule that an owner of goods who has voluntarily given up possession for a period of time, as in the case of a bailment, ordinarily cannot sue for a conversion taking place while he or she is out of possession.[9]

Conversion typically is found in cases of wrongful taking of a chattel, wrongful disposal of a chattel or wrongful detention of a chattel. A review of case law in Manitoba and other jurisdictions illustrates the variety of factual situations falling within the concept of conversion. These include: wrongful taking of another's jewellery;[10] wrongful sale of a chattel left in a pawn shop;[11] wrongful seizure of goods by government authorities;[12] wrongful sale of a taxicab and licence against which an institutional lender held security;[13] a bank's wrongful negotiation of cheques;[14] refusal of permission to collect personal property during a labour dispute;[15] a stockbroker's sale of shares without authority;[16] production from the plaintiff's oil well after the defendant's lease expired; [17]and car theft.[18]

The defendant need not be in possession of the chattel for conversion to occur.[19]

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[6] *Kuwait Airways Corporation v. Iraqi Airways Company and others*, [2002] UKHL 19 at para. 39.
[7] Rainaldi, *supra* note 5 at 4-21; *Glasvan Great Dane Sales Inc. v. Qureshi* (2003), 35 B.L.R (3d) 317 (Ont.Sup.Ct.) at paras. 27-28 (CANLII).
[8] Klar, *supra* note 2 at 96-97.
[9] An owner in these circumstances may be able to bring an action for damage to his or her reversionary interest in the chattel. See Klar, *supra* note 2 at 105.
[10] *Steiman v. Steiman* (1979,) 11 Man. R. (2d) 362; rev'd on other grounds (1982) 18 Man. R (2d) 203(Man. C.A.).
[11] *Kotello v. Dimerman*, 2006 MBCA 77, 271 D.L.R. (4th) 147.
[12] *Sala v. Manitoba*, 2001 MBQB 123, 158 Man. R. (2d) 93.
[13] *Sun Mortgage Corp. v. Kumar* (2000), 146 Man. R. (2d) 89 (Q.B.).
[14] *Boma Manufacturing*, *supra* note 4.
[15] *Howard E. Perry Ltd. v. British Railway* Board, [1980] 2 All. E. R. 579 (Ch. D.).
[16] *Dominion Securities Ltd. v. Glazerman* (1984), 29 C.C.L.T. 194 (Man. C.A.).
[17] *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, 2007 ABQB 353, 428 A.R. 102.
[18] *St. Vladimir College and Minor Seminary v. Champs Take Home Ltd. et al.* (1974), 51 D.L.R. (3d) 155 (Man. Q.B.).
[19] *Oakley v. Lister*, [1931] 1 K.B. 148; *Unisys Canada Inc. v. Imperial Optical Co.* (2000), 2 B. L. R. (3d) 172 (Ont. C.A.).

The tort is one of strict liability and the defendant's innocence in handling or disposing of a chattel will not absolve him or her of liability.[20] Thus, both a seller and purchaser of converted goods may be liable in conversion.[21]

The cause of action arises at the time of the defendant's conversion of the chattel, in whatever form that conversion takes.[22] In *Broder v. Broder*,[23] for example, the court allowed a claim in conversion more than 25 years after the defendant took possession of the plaintiffs' chattel. It was only when the defendant began advertising the sale of the chattel that there was an intentional dealing or interference with the chattel inconsistent with the rights of the person entitled to its possession.[24]

The general rule is that damages in a conversion action are assessed as the value of the chattel at the time of conversion. Several Manitoba decisions confirm this view.[25]

However, other approaches are available and most sources now describe alternative methods for establishing damages in a conversion action.[26] For example, some courts have remarked that the proper measure of damages in conversion is the value of the chattel at the date of conversion, and consequential damages for the loss of opportunity to dispose of the chattel at its highest value prior to the end of trial.[27] Punitive damages and general damages for loss of reputation and emotional distress have also been awarded in conversion actions. [28]

Judgment for damages is the proper remedy in an action in conversion and this has been described as one of the principal features distinguishing conversion from detinue:

> An action in conversion is a purely personal action and results in a judgment for pecuniary damages only. In an action in detinue, the plaintiff may elect as his remedy the return of the chattel. Thus, where the chattel is of special value to the plaintiff, an action for detinue is appropriate.[29]

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[20] *Boma, supra* note 4.

[21] Osborne, *supra* note 3 at 309. The rules respecting transfer of title by an unauthorized seller are governed by the common law principle of *nemo dat quod non habet* and the exceptions to that principle, and by statutory rules set out in, among others, *The Sale of Goods Act*, C.C.S.M. c. C10, *The Factors Act*, C.C.S.M. c. F10 and *The Personal Property Security Act*, C.C.S.M. c. P35.

[22] Rainaldi, *supra* note 5 at 4-10.6.

[23] 2004 ABQB 175, 353 A.R. 79 (QL), aff'd 2005 ABCA 442, 376 A.R. 180, leave to appeal to S.C.C. refused (31335, April 27, 2006).

[24] *Ibid.* at paras. 42,59.

[25] *Steiman v. Steiman* (Man. C.A.), *supra* note 10; *Dominion Securities v. Glazerman, supra* note 16; *Kerr v. Fleming Financial Corp.*(1998), 131 Man. R. (2d) 116 (C.A.).

[26] G.H.L. Fridman, *The Law of Torts in Canada,* 3d ed., (Toronto: Thomson Carswell, 2010) at 132-133; Rainaldi, *supra* note 5 at 4-32; Osborne, *supra* note 3 at 310-311.

[27] See *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633 at 652-653.

[28] For punitive damages see *Norkan Lodge Co. Ltd. v. Gillum* (1984), 39 A.R. 597 (N.W.T.S.C.); *Smith v. Reid* (1994), 91 B.C.L.R. (2d) 279 (B.C.S.C.). For general damages see *Howard v. Madill*, 2010 BCSC 525.

[29] Rainaldi, *supra* note 5 at 4-30.4. There is some isolated Canadian authority for the proposition that courts have discretion to order specific restitution in conversion actions: see Fridman, *supra* note 26 at 137. *Lockeridge v. Reeder* (1920), 52 D.L.R. 706 (Sask. C.A.), cited by Professor Fridman in support of this position, has not been extensively followed in subsequent decisions.

### 1. Reform of Conversion

Several law reform agencies have recommended changes to the law of conversion including, in Canada, the Ontario Law Reform Commission and the Law Reform Commission of British Columbia.[30] The historic development of the tort has resulted in features which, to some, no longer seem relevant or grounded in defensible legal policy. Principal among these are the rules respecting damages, which are not always followed in practice and have resulted in conflicting jurisprudence.[31] In addition, the tort of conversion overlaps significantly with both the torts of detinue and trespass, resulting in recommendations for simplification and streamlining.

Only in the United Kingdom have reform efforts been put into effect with the enactment of the *Torts (Interference with Goods) Act 1977*.[32] The Act creates an action for wrongful interference with goods, which is defined to mean conversion, trespass and negligence and any other tort so far as it damages goods or an interest in goods. The Act abolishes detinue as a separate cause of action.[33]

The U.K legislation is not a codification of the law of interference with chattels, and preserves the existing individual torts of conversion, trespass and negligence. Consequently, the Act has been criticized for not sufficiently emphasizing the conceptual unity of the torts.[34] Other commentators have remarked that, aside from abolishing detinue and introducing a rationalized set of remedies, the Act has effected only minor changes to the law relating to the individual torts.[35]

## B. DETINUE

Detinue is closely related to the tort of conversion. Detinue is the unexcused failure to return goods on lawful demand of a person with superior title. The detention must be adverse to the rights of the claimant. It is a much narrower concept than conversion, which "may be committed in many ways not involving an adverse detention of goods."[36]

A demand for the return of the chattel and a refusal are the principal features of the tort of detinue.[37] This requirement is significant because it allows a defendant who is innocently holding the goods of another to return them and thereby avoid litigation.[38] The demand

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[30] Ontario Law Reform Commission, *Study Paper on Wrongful Interference with Goods*, 1989; Law Reform Commission of British Columbia, *supra* note 1.
[31] See Klar, *supra* note 2 at 104.
[32] *Torts (Interference with Goods) Act 1977* (U.K.), 1977, c. 32.
[33] *Ibid.* s. 2(1).
[34] Ontario Law Reform Commission, *supra* note 30 at 37.
[35] Cynthia Hawes, *Tortious Interference with Goods in New Zealand: The Law of Conversion, Detinue and Trespass* (Ph.D. thesis, University of Canterbury, 2010) [Unpublished], online: University of Canterbury < http://ir.canterbury.ac.nz/bitstream/10092/3834/2/PhD_CHawes.pdf.txt> at 226.
[36] N.E. Palmer, *Bailment*, 2d ed. (Sydney: The Law Book Co. Ltd., 1991) at 241.
[37] Rainaldi, *supra* note 5 at 4-25; *Anderson Animal Hospital Ltd. v. Watt* (1991), 72 Man. R. (2d) (Man. Q.B.) 225 at 226.
[38] Fridman, *supra* note 26 at 139.

requirement is also relevant to limitations because the cause of action does not arise until the defendant has refused the plaintiff's demand for the return of the chattel.[39]

To bring a claim in detinue, the claimant must have a right to possession of the chattel.[40] The defendant must be in possession of the chattel at the time the demand for its return is made, or be estopped from denying possession as in the case of a bailee who lost possession of the chattel through an intentional or negligent act.[41]

A claim in detinue can be defeated by returning the chattel at any time until the trial. The date of valuation for damages in detinue is the date of judgment because conceptually the damages are ordered in lieu of the return of goods.[42]

The plaintiff may seek specific restitution of the chattel or payment of its value and damages for its detention. Judgment can take one of three forms:

a) a judgment for the value of the chattel and damages for its detention;
b) an order for the return of the chattel or recovery of its value as assessed and damages for its detention; and
c) an order for the return of the chattel and damages for its detention.[43]

Restitution will typically be ordered where goods are unique or irreplaceable. Otherwise the normal remedy is damages.[44]

There is considerable overlap between detinue and the interlocutory remedy of an interim order for the recovery of personal property, formerly known as replevin. This is a procedure designed to secure the timely return of chattels that have been wrongly taken or detained by another person.[45]

The tort of detinue rarely receives judicial consideration in Manitoba and appears to have largely fallen into disuse. This may be a result of the availability of the interlocutory remedy for return of personal property, or of the significant overlap between detinue and conversion.

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[39] *Clayton v. LeRoy*, [1911] K. B.1031 (C.A.) at 1048.
[40] Rainaldi, *supra* note 5 at 4-21; *Sprung Instant Structures Ltd. v. Royal Bank*, 2008 ABQB 30, 439 A.R. 334.
[41] Osborne, *supra* note 3 at 307-308.
[42] Fridman, *supra* note 26 at 141.
[43] *General & Financial Facilities Ltd. v. Cooks Cars (Romford) Ltd.*, [1963] 1 W.L.R. 644 (C.A.) at 650.
[44] *Mayne v. Kidd*, [1951] 2 D.L.R. 652 (Sask. C.A.); see also Osborne, *supra* note 3 at 308.
[45] In Manitoba, replevin is governed by section 59 of *The Court of Queen's Bench Act*, C.C.S.M. c. C280, and Rule 44 of *The Queen's Bench Rules*, Man. Reg.553/88.

## CHAPTER 3

## REASONS FOR REFORM

The Commission's immediate purpose in proposing reform to the law of limitation of actions in conversion and detinue is to ensure consistency with the standard limitation regime described in the *Limitations* Report.

The underlying question for consideration is whether special limitation provisions are necessary for actions in conversion and detinue. A related issue is whether the recommendations in this report should apply to actions in both conversion and detinue. The Commission will return to these questions in Chapter 5 of this report.

In addition to these considerations, actions in conversion and detinue have long raised unique and challenging issues in respect of limitations of actions. A review of the case-law and academic commentary indicates that these problems generally fall within five related categories:

a) successive conversions or detentions;
b) the rights of good faith purchasers of converted or detained goods;
c) the extinguishment of title in the converted or detained goods on expiry of a limitation period;
d) the operation of limitation periods in respect of theft-related conversions; and
e) concurrent actions in conversion and detinue.

The recommendations that follow in Chapter 5 will attempt to address these issues while ensuring that the law of limitations of actions in conversion and detinue is as consistent as possible with the standard limitation regime proposed in the Commission's 2010 *Limitations* report.

This chapter of the report will describe some of the problems associated with limitation periods and actions in conversion and detinue. The following chapter will discuss the various ways in which law reform agencies and legislatures have attempted to address these issues.

### A. SUCCESSIVE CONVERSIONS OR DETENTIONS

As discussed in Chapter 2, the cause of action in conversion arises when the defendant converts the chattel. In cases of a single conversion, determining when the cause of action arises is relatively straightforward. More often, however, the original converter will pass the chattel on to a third party, resulting in a second conversion and a second cause of action. It is not unusual for there to be a string of transactions in relation to the same piece of personal property, resulting in multiple, distinct causes of action in conversion.

Likewise, the cause of action in detinue arises when the demand for the return of the chattel is refused. This can also occur more than once in respect of the same chattel, giving rise to new causes of action with every successive detention.

Under most pre-reform limitations legislation in Canada, a limitation period runs from the date the cause of action accrues, or arises.[1] The application of this rule to successive transactions involving the same chattel has the potential to produce anomalous results and to undermine the purpose of limitations legislation. Without some modification to the law, as pointed out by the Ontario Law Reform Commission, "the person further from the start of the chain of transactions will be easier to sue than the presumptively less innocent parties through whose hands the goods passed earlier."[2] In addition, since each new conversion or detention produces a new cause of action triggering a new limitation period, the repose function of limitations legislation is largely defeated.

Efforts have been made to address the problem of successive conversions in existing limitations legislation. In Manitoba, for example, section 54 of *The Limitation of Actions Act* provides that in cases of successive conversions or detentions, time starts running on the date of the first conversion or first detention. After six years, no action is available in conversion or detinue against any defendants in a chain of transactions in respect of a particular chattel.

Although this approach introduces some certainty into the limitation regime in respect of converted or detained chattel, it can produce unanticipated results. Commentators have remarked that this rule favours a purchaser of stolen goods over a purchaser of lost goods. In the case of stolen goods, the first conversion occurs with the theft. In the case of lost goods, the first conversion occurs when the finder resells them.[3] Thus, a purchaser of stolen goods has the benefit of a limitation period running from an earlier event.

This rule also raises the possibility of a limitation period expiring before the claimant is aware of the first conversion, thereby depriving the claimant of the right to sue without ever having knowledge of the cause of action.

The application of the standard limitation regime proposed in the Commission's *Limitations* report complicates the problem of successive transactions further. The operation of the discoverability test means that, instead of a single limitation period running from the time of the conversion, there may be different limitation periods running in respect of the same chattel as against different defendants. Moreover, without some modification to the standard limitation regime, the ultimate limitation period could be denied its primary purpose which is to provide for a final date after which no action may be brought in respect of converted or detained chattel. With each successive conversion or detention, a new ultimate limitation period would be triggered, thereby undermining the repose function of the legislation.

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[1] See for example *The Limitation of Actions Act*, C.C.S.M. c. L150, s. 2(1).
[2] Ontario Law Reform Commission, *Study Paper on Wrongful Interference with Goods*, 1989 at 140.
[3] *Ibid.* at 141.

## B. GOOD FAITH PURCHASERS

A significant focus of recent reform efforts in the law of limitations concerns the interests of good faith purchasers of converted goods. Is it reasonable to permit a claimant to obtain damages, or potentially specific restitution, from an innocent purchaser up to 15 years after the purchase? The question concerns the balance between the commercial certainty that comes from giving effect to good faith market-based transactions, and the claimant's property interests in the chattel.

Courts and legislators have sought to achieve this balance for many years. The problem has been described in the following terms:

> In the development of our law, two principles have striven for mastery. The first is the protection of property. No one can give a better title than he himself possesses. The second is the protection of commercial transactions. The person who takes in good faith and for value without notice should get good title..." [4]

Several legislatures and reform agencies have proposed special exceptions to the ultimate limitation period under the modern regime in respect of good faith purchases.[5] As will be discussed in Chapter 4, these exceptions typically provide that no action is available against a good faith purchaser more than two years after the good faith purchase, regardless of discoverability.

## C. THE EXTINGUISHMENT OF TITLE

At the expiry of a limitation period, the claimant loses the right to sue. In the context of conversion and detinue, the claimant would therefore lose the right to sue but might continue to have a valid property interest in the converted or detained chattel. This could allow the claimant lawfully to retake goods if the opportunity arose, arguably rendering the limitation period irrelevant.

To address this issue, section 54 of Manitoba's *Limitation of Actions Act* currently provides for the extinguishment of title at the end of the six-year limitation period. In Canada, only the Manitoba Act contains this provision, which closely mirrors the equivalent section in the United Kingdom's *Limitation Act 1980*.[6]

Providing for extinguishment of title under a modern, discoverability-based limitations system is complicated. The date of knowledge test means there may be different limitation periods in respect of claims against different defendants. If title is extinguished at the expiry of a two-year limitation period, the result could be a restriction on the plaintiff's ability to sue

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[4] *Bishopsgate Motor Finance Corporation, Ltd. v. Transport Brakes Ltd.*, [1949] 1 All E. R. 37 (C.A.) at 46.

[5] See for example the Saskatchewan *Limitations Act*, S.S. 2004, c. L-16.1, s. 7(2); the Ontario *Limitations Act 2002*, S.O. 2002, c. 24, Sch. B., s. 15(3); the New Brunswick *Limitation of Actions Act*, S.N.B. 2009, C. L-8.5, s. 9(1)(a).

[6] *Limitation Act 1980* (U.K.), 1980, c. 58, s. 3(2). New Brunswick's *Limitation of Actions Act*, *supra* note 5, contains a variation of this rule.

subsequent converters because he or she would no longer be able to establish the requisite right to possession.

The Alberta Court of Queen's Bench decision in *Barberree v. Bilo*[7] illustrates the significance of a provision extinguishing title at the expiry of a limitation period in cases of conversion. In *Barberree*, the plaintiff's former husband had converted her motorcycle to his own use and subsequently sold it to an innocent purchaser. More than two years had elapsed since the original conversion of the motorcycle and the plaintiff therefore had no right of action against her former husband. She sought damages or the return of the motorcycle from the good faith purchaser. The purchaser argued that the plaintiff's right of action against him should rightfully expire at the same time as against the original converter, because her title effectively expired at that time. The court rejected this argument finding that the Alberta limitations legislation, unlike that in Manitoba, did not provide for extinguishment of title at the expiry of a limitation period. The plaintiff was entitled to a new two- year limitation period on discovery of the second conversion.

## D. THEFT-RELATED CONVERSIONS

As noted in Chapter 2, conversion can arise as a result of theft. The theft of personal property is a conversion, as is the purchase or reception of stolen personal property.

The operation of a limitation period in respect of an action in conversion raises the prospect that thieves and other wrongdoers could escape liability by relying on a limitations defence in respect of their wrongful conversion of another's goods. This is exacerbated by the possibility that a wrongdoer could acquire rights of possession over a stolen chattel at the expiry of a limitation period. These results are contrary to a fundamental legal policy that wrongdoers should not be permitted to benefit from their illegal acts.[8]

This has been a particular concern in the United Kingdom, where the *Limitation Act 1980* contains special provisions in respect of theft-related conversions.[9]

No Canadian legislation currently provides for special exemptions to limitation periods in respect of theft-related conversions.

## E. CONCURRENT ACTIONS IN CONVERSION AND DETINUE

Some courts and commentators have expressed concern about the feature of detinue requiring a demand for the return of the chattel and a refusal before a cause of action can be established. This requirement could allow a plaintiff to delay a demand for the return of a chattel,

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[7] *Barberree v. Bilo* (1991), 126 A.R. 121 (Q.B.).
[8] This policy is discussed in the Law Commission's report *Limitation of Actions* (Law Com. No. 270, 2001) at paras. 4.55-4.57.
[9] *Limitation Act 1980*, *supra* note 6, s. 4.

thereby controlling the start date of the limitation period.[10]

This feature of the tort is particularly significant in light of the extensive overlap between conversion and detinue. The same set of facts can often give rise to both an action in conversion and an action in detinue, with different limitation periods running from different dates. In theory, a defendant in possession of converted chattel could be liable in detinue at any time a demand is made for the return of chattel, even if the chattel had been held well past the expiry of a limitation period for an action in conversion.[11]

The Federal Court of Canada addressed this issue in *Albion Transportation Research Corp. v. Canada.*[12] In this case, the plaintiff made a claim in respect of wrongful seizure of a chattel by Revenue Canada. The plaintiff argued, among other things, that its action was not statute-barred because time only began running when its demand for the return of the chattel was refused. The Court found that the plaintiff's action was in conversion and that time began running when the plaintiff became aware of the seizure. The Court described what it called the absurd result of allowing an aggrieved party knowing full well of the seizure being able to manipulate the operation of the statutory limitation period by delaying the demand for the return of the seized property. In the Court's view, this would undermine the very purpose of having a limitation period for conversion.[13]

The Ontario Superior Court of Justice recently addressed similar facts in *South Simcoe Railway Heritage Corporation v. Wakeford.*[14] In this case, the defendant had registered a domain name on behalf of the plaintiff non-profit corporation. In 2004, the defendant transferred the registration of the domain name from the corporation to himself. His actions were known to the plaintiff at the time. The plaintiff later asked the defendant to change the registrant name back to that of the corporation, which the defendant refused to do. The claim for damages in detinue and conversion of the domain name was brought in 2010. The defendant argued that the claim was time-barred.

Among other arguments, the plaintiff submitted that time only began to run when its request for re-registration of the domain name was refused, which would bring it within the two-year basic limitation period.

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[10] See *Musson v. Memorial University of Newfoundland*(2002), 112 A.C.W.S. (3d) 154 (Ont. Sup.Ct.) at para. 92 (QL):"I confess that I am troubled by the notion that the limitation period for detinue runs only from the time of a demand and refusal. This permits a plaintiff to extend the limitation period indefinitely, if so inclined." See also Cynthia Hawes, *Tortious Interference with Goods in New Zealand: The Law of Conversion, Detinue and Trespass* (Ph.D. thesis, University of Canterbury, 2010) [Unpublished], online:University of Canterbury< http://ir.canterbury.ac.nz/bitstream/10092/3834/2/PhD_CHawes.pdf.txt> at 11-12: " This aspect of the tort obviously gives rise to difficulty; in particular, it permits the owner of the chattel to allow time to run indefinitely before making any demand upon the person who has detained the goods, thereby giving to the plaintiff some ability to control both the date when the cause of action arises and the date at which damages should be assessed."

[11] See *Clayton v. LeRoy,* [1911] 2 KB 1031 at 1048, see also L.N. Klar, *Tort Law,* 4th ed. (Scarborough: Thomson Carswell, 2008) at 94: "If detinue arises only when a request and refusal are made, it is possible that the rights of a plaintiff who is out of time to sue for a prior conversion or breach of bailment may be revived, once the plaintiff makes a demand for the goods and sues in detinue… This state of affairs would be unsatisfactory."

[12] [1998] 1 F.C. 78 (F.C.T.D.) (QL).

[13] *Ibid.* at para. 24.

[14] 2011 ONSC 1234 (CANLII).

The Court disposed of this argument by finding that a claim in conversion was discoverable when the plaintiff learned that the defendant had transferred registration of the domain name to himself.[15]

These cases highlight some of the problems caused by concurrent causes of action in conversion and detinue. The Commission will consider whether special provisions are required to address these problems. No other Canadian legislation contains such provisions.

[15] *Ibid.* at paras. 19-20.

## CHAPTER 4

## OPTIONS FOR REFORM

Law reform agencies and legislatures in Canadian jurisdictions and elsewhere offer a number of options for the reform of the law of limitations in respect of actions in conversion and detinue. These range from legislation that contains no special provisions in regard to conversion and detinue,[1] to statutes containing detailed rules in respect of such actions. This chapter will describe the most recent initiatives to propose or enact reform in the context of modern limitations regimes, and analyze the manner in which they address the issues of successive conversions or detentions, good faith purchasers, extinguishment of title and theft-related conversions.

### A. SASKATCHEWAN AND ONTARIO MODEL

Saskatchewan's 2004 *Limitations Act* and Ontario's *Limitations Act, 2002* both contain an exception to the ultimate limitation period for good faith purchasers.[2] The Saskatchewan Act's section 7(2) is an example:

> 7(2) With respect to any claim against a purchaser of property for value acting in good faith to which a limitation period applies, no proceeding shall be commenced with respect to conversion of the property after two years from the day on which the property was converted whether or not the limitation period has expired.

The Acts are otherwise silent on the questions of successive conversions, the effect of the expiry of the limitation period on title and special provisions for theft-related conversions. Under this model, claims against all other defendants, presumably including receivers of converted or detained goods from good faith purchasers,[3] are subject to the standard regime of a two-year discovery limitation period and a 15-year ultimate limitation period.

Like most modern Canadian limitations legislation, the Saskatchewan and Ontario Acts refer only to conversion of property and omit any reference to wrongful detention.

The Saskatchewan and Ontario model provides protection to innocent purchasers, thereby enhancing the commercial certainty that accompanies recognition of good faith transactions.

On the other hand, there is some potential for unfairness to the claimant under this approach, with the possibility that he or she could lose the right to sue the good faith purchaser without ever being aware of the conversion.

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[1] See for example the Alberta *Limitations Act*, R.S.A. 2000 c. L-12; and the Uniform Law Conference of Canada's *Uniform Limitations Act*, online: <http://www.ulcc.ca/en/us/Uniform_Limitations_Act_En.pdfniform>.

[2] *Limitations Act*, S.S. 2004, c. L-16.1, s. 7(2); *Limitations Act 2002*, S.O.2002, c. 24, Sch. B, s. 15(3).

[3] This point was made in a submission to the Commission during the consultation period in respect of the *Limitations* report: Submission by T. Rattenbury (December 17, 2009).

Introducing a good faith purchaser exception to limitations legislation also has the potential to create complexity in the law.[4] However, in the Commission's view, any complexities created by such a provision may be outweighed by the advantages of fairness to good faith purchasers and reinforcement of commercial certainty.

This approach on its own, however, does not adequately address the problem of successive conversions. With the exception of a claim against a good faith purchaser, all claims in conversion and detinue would be subject to the standard limitation regime. This raises the question of when the ultimate limitation period would start to run in cases of successive conversions. This uncertainty has the potential to undermine many of the purposes of limitations legislation including repose, economic and legal certainty and evidentiary soundness.

## B. NEW BRUNSWICK MODEL

New Brunswick's *Limitation of Actions Act*[5] addresses successive conversions, the interests of good faith purchasers and the extinguishment of title.

Section 9 of the New Brunswick Act provides as follows:

> 9(1) No claim to recover possession of personal property that has been converted shall be brought
>
> (a) If the defendant is a purchaser of the personal property for value acting in good faith, after 2 years from the day the purchaser purchased the personal property, and
>
> (b) In any other case, after the earlier of
>
> (i) Two years from the day on which the claimant first knew or ought reasonably to have known the identity of the person who has possession of the personal property, and
>
> (ii) Fifteen years from the day on which a conversion of the personal property first occurred.
>
> 9(2) On the expiry of a limitation period under this section, the claimant's title to the personal property is extinguished.

Section 10 reads:

> 10(1) Subject to subsection (2), Part 2 applies to a claim for damages for conversion.

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[4] See British Columbia Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office, *White Paper on Limitation Act Reform: Finding the Balance* (September, 2010), online: <http://www.ag.gov.bc.ca/legislation/limitation-act/pdf/LimitationActWhitePaperFINAL.pdf> at 48.

[5] *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5.

> 10(2) If there have been 2 or more conversions of the same personal property, a claim for damages for conversion shall not be brought against a defendant if, under section 9, a claim to recover the possession of the personal property from that defendant cannot be brought, or could not be brought if that defendant were still in possession of the property.

In its *Commentary on Bill 28: Limitation of Actions Act*,[6] the New Brunswick Office of the Attorney General explained the effect of these sections:

> [Sections 9 and 10] create new limitation periods for the recovery of personal property and conversion. The subject is complicated because, under the law of conversion, when property passes from person to person different claims can arise against different people at different times...Extinguishment of title is the lynchpin of this section. Unless the title is extinguished, the claimant's ability to bring claims against subsequent transferees and owners can continue indefinitely, even if they have paid for the property, and had no reason to believe that anybody else might claim the property was his or hers.

Like the Saskatchewan and Ontario Acts, New Brunswick's legislation provides a good faith purchaser exception to the standard limitation regime.

Unlike the other Canadian models discussed in this report, section 9(2) of the New Brunswick Act also provides for extinguishment of the owner's title in the goods at the expiry of a limitation period.[7] This section could operate in any one of the following ways:

- Title may be extinguished at the expiry of the two-year discoverability limitation period. In an action in conversion or detinue, this would result in the claimant losing the ability to sue any subsequent converters because the claimant could no longer establish the requisite right to possession of the chattel.

- Title may be extinguished at the expiry of the ultimate limitation period. This might assist in avoiding self-help measures and recaption after the expiry of the limitation period but could also produce unfairness to the plaintiff who may lose the ability to sue subsequent converters without ever being aware of the original conversion.

- Title may be extinguished at the expiry of the good faith purchaser exception. In the Commission's view, this is an unsatisfactory result. It creates the possibility that a claimant could lose the right to sue both the good faith purchaser and any subsequent converters without ever being aware of the transaction, after only two years. This appears to place undue emphasis on the rights of the good faith purchaser at the expense of those of the original owner.

The principal merit of the New Brunswick model is that it attempts to deal with problems of successive transactions while also providing some protection for good faith purchasers.

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[6] New Brunswick Office of the Attorney General, *Commentary on Bill 28: Limitation of Actions Act*, online: <http://www.gnb.ca/legis/bill/pdf/56/3/Limitations-e.pdf> at 6-7.

[7] *Limitation of Actions Act, supra* note 5, s. 9(2).

However, the legislative distinction between claims for the return of converted goods and claims for damages in respect of converted goods complicates the provision. As discussed in Chapter 2, the proper remedy in an action in conversion is an award of damages. Detinue is the appropriate action when seeking a return of goods, although, as noted above, such an order is also rare. The more common remedy in detinue is an award of damages. The structure of Sections 9 and 10 of the New Brunswick Act seems to emphasize the importance of restitution of the chattel as the primary remedy, which is not consistent with practice in either conversion or detinue.

## C. BRITISH COLUMBIA MODEL

In September 2010, The Ministry of Attorney General of British Columbia issued its *White Paper on Limitation Act Reform*.[8] In the White Paper, the government proposes a series of reforms to British Columbia's *Limitation Act*. The Paper suggests that in general the two-year basic limitation period and the ultimate limitation period should apply to conversion claims in the same way as to all other claims.

The White Paper considers and provisionally rejects the adoption of a special two-year ultimate limitation period for conversion claims against good faith purchasers, as found in the Saskatchewan and Ontario models. The White Paper does not support the good faith purchaser provision because it would represent a novelty in British Columbia law and may therefore add complexity to the legislation, and is also potentially unfair to claimants who do not discover the conversion within two years of the purchase.[9]

The paper describes the potential problems of successive conversions in the following terms:

> Without a clarification about when the limitation period begins to run, one could argue that the ultimate limitation period starts to run after the last conversion rather than the first. If the property is converted again and again, the clock would not start until the very last conversion. This could potentially result in a good faith purchaser facing a conversion lawsuit that dated back more than 10 or 15 years.[10]

To address this problem, the White Paper recommends a provision that the ultimate limitation period run from the date on which the property was first converted by any person.[11]

The proposed approach fulfills many of the purposes of limitations legislation, including finality and certainty. No action is available against any person in respect of the conversion or detention more than 15 years after the original act or omission. The exception presumably would be when a defendant wrongfully conceals from the plaintiff relevant information about the claim,

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[8] British Columbia Ministry of Attorney General, *supra* note 4.
[9] *Ibid* at 48.
[10] *Ibid.*
[11] *Ibid.*

in which case the ultimate limitation period would not run as against that person until discovery is made.[12]

One negative aspect of this approach is that it contemplates a long period of liability for good faith purchasers. It places a responsibility on them to make inquiries into title before purchasing goods on the market. Although this may not be unreasonable, it does not necessarily accord with the likely insurance position of the parties involved. An owner of goods is more likely to be insured against loss or theft than a purchaser is to be insured against defective title of purchased goods.[13]

The White Paper is silent on the question of extinguishment of title at the expiry of a limitation period. It also expressly recommends that British Columbia's modernized *Limitation Act* not refer to the detention of goods. [14]

## D. NOVA SCOTIA MODEL

In 2011, The Nova Scotia Department of Justice released a *Discussion Paper on Limitation of Actions Act*.[15] The Paper recommends a provision modeled in part on the Saskatchewan and Ontario good faith purchaser exemption. Nova Scotia's recommendation is for the following:

> 9. No claim to recover possession of personal property that has been converted shall be brought against a purchaser of the personal property for value acting in good faith, after two years from the day the property was converted.

This section appears to protect a good faith purchaser from a claim only for the recovery of possession of personal property, and not from a claim for damages, which is the conventional remedy in conversion actions.

The Paper also invited comments on whether time should start to run on conversion or first conversion, and whether there should be a provision for extinguishment of title.

## E. THE LAW COMMISSION MODEL

In 2001, England's Law Commission issued its *Report on the Limitation of Actions* which recommended modernizing the *Limitation Act 1980* to provide for a basic three-year limitation period from the time of discovery, and an ultimate 10-year limitation period.[16] The Report includes a number of specific recommendations with respect to actions in conversion.

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[12] Like most modern limitations models, the British Columbia White Paper recommends a provision suspending the limitation period if the defendant has wilfully concealed information about the claim from the plaintiff, *supra* note 4 at 62.
[13] See the Law Commission, *Limitation of Actions, A Consultation Paper* (Consultation Paper No. 151, 1998) at para. 13.44.
[14] *Ibid.* This will be discussed in more detail in Chapter 5.
[15] Nova Scotia Department of Justice, *Discussion Paper on Limitation of Actions Act*, 2011.
[16] The Law Commission, *Limitation of Actions* (LawCom No. 270, 2001).

In light of the special theft-related exceptions in the existing U.K. legislation, the Law Commission took care to distinguish between theft-related conversions and other acts of conversion.

The Law Commission's recommendations in respect of actions in conversion can be summarized as follows:

- The recommended three-year basic limitation period and 10-year ultimate, or long-stop, limitation period should apply with some qualifications to actions in conversion.
- The three-year basic limitation period should apply without qualification to all non theft-related conversions.
- The three-year basic limitation period should apply to theft-related conversions with the modification that, in addition to the other legislated factors, the plaintiff would have to know the whereabouts of the stolen property before a claim is discovered.
- The ultimate limitation period runs from the first conversion for actions in respect of non-theft-related conversions.
- For theft-related conversions, the long-stop limitation period would not run until the date on which the goods are purchased by a person acting in good faith. It would then run from that date in favour of the good faith purchaser and anyone claiming through him.
- The claimant's title to converted goods should be extinguished on the expiry of the long-stop limitation period.[17]

In its 1998 Consultation Paper on limitation of actions, the Law Commission suggested the possibility that a special theft-related exemption would not be necessary because of the recommended provisions delaying the running of the ultimate limitation period in cases of deliberate or dishonest concealment.[18] In its final report, however, the Law Commission expressed doubt that the concealment provision would provide sufficient protection to the claimant whose stolen goods have passed out of the hands of the original thief to a donee or purchaser not acting in good faith. In such cases, the defendant may often have no connection to the plaintiff making it difficult to argue that he or she concealed any information.[19]

Special provisions for theft-related conversions would be a novelty in Canadian law. No modern Canadian limitations legislation contains such a provision. The theft-related provisions in the U.K.'s *Limitation Act 1980* have been criticized for their obscurity and have given rise to some difficulties of interpretation.[20] A theft-related provision in Manitoba's legislation could

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[17] *Ibid.* at para. 4.67.
[18] The Law Commission, *Limitation of Actions, A Consultation Paper, supra* note 13 at para. 13.62.
[19] The Law Commission, *Limitation of Actions, supra* note 16 at para. 4.61.
[20] A. McGee, *Limitation Periods,* 6th ed. (London: Sweet & Maxwell, 2010) at 249; the Law Commission, *Limitation of Actions, A Consultation Paper supra* note 13 at para. 3.113.

foreseeably result in similar problems. One could anticipate, for example, some difficulty in establishing what constitutes a theft or a theft-related conversion for the purpose of the legislation.

Recommendation 23 of the Manitoba Law Reform Commission's *Limitations* report provides that the ultimate limitation period is suspended during any time in which the defendant wilfully conceals from the claimant the fact that an injury has occurred, or that it was caused or contributed to by an act or omission of the defendant.[21] This section is designed to prevent unfairness to a plaintiff by allowing him or her to pursue a defendant who has wilfully concealed information in respect of the claim. In most cases, thieves should fall into the category of defendants who wilfully conceal information from the plaintiff.

From the absence of any theft-related provisions in other modern Canadian limitations legislation, it appears that most jurisdictions are content to rely on the wilful concealment provisions to ensure that thieves are not permitted to benefit from their wrongdoing.

[21] Manitoba Law Reform Commission, *Limitations* (Report No. 123, 2010) at 70; see also s.11 of the draft *Limitations Act* appended to the *Limitations* Report as Appendix A, at 114.

## CHAPTER 5

## CONCLUSIONS AND RECOMMENDATIONS

The analysis in Chapter 4 leads the Commission to the following conclusions and recommendations:

### 1. The Need for Special Limitations Provisions for Actions in Conversion and Detinue

The Commission's analysis starts with the principle that the standard limitation regime proposed in the *Limitations* report should generally apply to actions in conversion and detinue. The philosophy underlying the standard limitation regime is that the two-year basic limitation and 15-year ultimate limitation should apply to all claims, with only limited exceptions. There appears to be no reason that the standard limitation regime should not apply in respect of actions in conversion and detinue, subject to the modifications discussed below.

The Commission has nonetheless concluded that a new *Limitations Act* should contain some exceptions and modifications to the standard limitation regime for actions in conversion and detinue. Alberta's *Limitations Act* and the Uniform Law Conference of Canada's *Uniform Limitations Act* do not provide any exceptions to the standard regime in respect of actions in conversion and detinue.[1] However, this report has attempted to highlight some of the difficulties that can arise when special provisions are not made for successive conversions. Without modification to the standard limitation regime for actions in conversion and detinue, the principal purposes of limitations legislation would be undermined by uncertainty over the start dates for limitation periods and the possibility of an indefinite extension of the ultimate limitation period.

On the related question of whether special limitations provisions should apply to both conversion and detinue, the Commission observes that most modern limitations legislation in Canada omits any reference to the detention of goods, or detinue.

In its recent *White Paper on Limitation Act Reform*, the British Columbia Ministry of the Attorney General commented on the existing section 10 of the British Columbia *Limitation Act*,[2] which governs cases involving multiple detentions of goods. The White Paper remarks that "some places have abolished this archaic type of lawsuit, also known as the tort of detinue."[3] The Paper suggests that the reform of limitations law only apply to conversion claims, and that the reference to cases involving multiple detentions of goods not be carried forward.

British Columbia's recommendation in this regard, and the omission of references to detention of goods in most modern limitations legislation, raise the question of the continued

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[1] *Limitations Act*, R. S. A. 2000 c. L-12; *Uniform Limitations Act* online:<http://www.ulcc.ca/en/us/Uniform_Limitations_Act_En.pdfniform>.

[2] R.S.B.C. 1996, c. 266.

[3] British Columbia Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office, *White Paper on Limitation Act Reform: Finding the Balance* (September, 2010), online:<http://www.ag.gov.bc.ca/legislation/limitation-act/pdf/LimitationActWhitePaperFINAL.pdf> at 48.

relevance of the tort of detinue. The Commission is aware of the potential for complexity stemming from the concurrent existence of detinue and conversion. Some law reform agencies and commentators have questioned the need for retaining an independent tort of detinue.[4] The United Kingdom abolished detinue by statute.[5]

However, the Commission is also aware of some important arguments against the abolition of detinue.[6] In addition, the tort of detinue continues to be a recognized cause of action in modern Canadian jurisprudence.[7]

In light of these considerations, it appears imprudent to discuss the continued viability of detinue in this report. The Commission is unable to make recommendations with respect to the retention or abolition of detinue without a more complete analysis of its ongoing relevance. Moreover, a report on limitations does not appear to be the most apt vehicle for such recommendations.

For the purpose of this report, the Commission recommends that a new *Limitations Act* in Manitoba refer to both the conversion and detention of goods.

**RECOMMENDATION 1**

***The standard limitation regime recommended in the Commission's* Limitations *Report should apply to actions in respect of converted and wrongfully detained chattel, subject to certain modifications.***

## 2. Successive Conversions or Detentions

The Commission concludes that the most effective way to address the problem of successive transactions is a provision that the ultimate limitation period begins to run on the date of the first conversion or detention. This is a version of the approach taken in the British Columbia *White Paper on Limitation Act Reform* and in the Law Commission's *Report on Limitation of Actions*.[8] The proposed provision supports the legislative goals of certainty, predictability and repose while providing the claimant a reasonable opportunity to take action

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[4] See for example The Law Reform Committee, *Report on Conversion and Detinue* (CMND4771, 1971); Cynthia Hawes, *Tortious Interference with Goods in New Zealand: The Law of Conversion, Detinue and Trespass* (Ph.D. thesis, University of Canterbury, 2010) [Unpublished] online: University of Canterbury <http://ir.canterbury.ac.nz/bitstream/10092/3834/2/PhD_CHawes.pdf.txt> at 231.

[5] *Torts (Interference with Goods) Act, 1977*, 1977, c. 32, s. 3(2).

[6] Commentators question, for example, whether the form of action for detinue which is based on a simple demand and refusal continues to constitute a tort under the U.K. law after the enactment of the *Torts (Interference with Goods) Act 1977*: N.E. Palmer, *Bailment, 2d ed.* (Sydney: The Law Book Co. Ltd., 1991) at 247. It is also relevant that neither the Ontario Law Reform Commission nor the Law Reform Committee of South Australia recommended the abolition of detinue: Ontario Law Reform Commission, *Study Paper on Wrongful Interference with Goods*, 1989; Law Reform Committee of South Australia, *Law of Detinue, Conversion and Trespass to Goods* (1987).

[7] See for example *Ahluwalia v. Richmond Cabs Ltd.*, 2008 BCSC 210(CANLII): *Sprung Instant Structures Ltd. v. Royal Bank*, 2008 ABQB 30, 439 A.R. 334; and, *Spolsky v 4279540 Manitoba Ltd.*, 2008 MBQB 308, 234 Man. R. (2d) 267 (Man. Master).

[8] British Columbia Ministry of Attorney General, *supra* note 3; the Law Commission, *Limitation of Actions* (LawCom No. 270, 2001).

against those who have converted or detained his personal property. The result is that no action may be brought in respect of conversion or detention after 15 years from the first act or omission, except against defendants who can be shown to have wrongfully concealed relevant information from the plaintiff, pursuant to section 11 of the Commission's proposed new *Limitations Act*.[9]

**RECOMMENDATION 2**

***The new* Limitations Act *should contain a provision that the ultimate limitation period runs from the first date the property is converted or wrongfully detained by any person, as provided in the Draft Legislation in Appendix A.***

## 3. Good Faith Purchasers

The Commission agrees with the principle of providing some additional protection to good faith purchasers of converted or detained goods. It does not seem reasonable that an innocent purchaser should face an extended period of liability following his or her purchase. This result would undermine the objectives of commercial certainty and does not accord with insurance related considerations.

The Commission recognizes the possibility of unfairness to claimants in cases where they are not aware of the good faith purchase and lose the right to sue without ever discovering the conversion. However, claimants in such a situation would continue to have a remedy in damages against all other converters within the four corners of the standard limitation regime.

**RECOMMENDATION 3**

***The new* Limitations Act *should contain a provision that no action may be brought against a good faith purchaser of converted or detained goods more than two years after the good faith purchase occurred, as provided in the Draft Legislation in Appendix A.***

## 4. Extinguishment of Title

England's Law Commission recommends a provision extinguishing title at the conclusion of the ultimate limitation period. In making this recommendation, the Commission emphasizes the need to avoid a circumstance in which the plaintiff could no longer sue but could take self-help measures to recapture the converted chattel. Extinguishment of title would accomplish this goal.[10]

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[9] Manitoba Law Reform Commission, *Limitations* (Report No. 123, 2010) Appendix A at 114.
[10] The Law Commission, *supra* note 8 at para. 4.62.

The New Brunswick Attorney General's Office indicates that extinguishment of title is the lynchpin of its provision in respect of conversion because, without it, the ultimate limitation period would never apply in respect of successive conversions.[11] The New Brunswick model does not provide for the ultimate limitation period to run from the date of first conversion, and the extinguishment of title serves a similar purpose.

There appear to be four possibilities in respect of the extinguishment of title at the expiry of a limitation period: (a) extinguishment of title at the expiry of any limitation period; (b) extinguishment of title at the expiry of the basic two-year limitation period or the 15-year ultimate limitation period; (c) extinguishment of title at the expiry of the 15-year ultimate limitation period; or, (d) no extinguishment of title. Each of these options has advantages and disadvantages, as discussed in the subsections that follow.

**(a) Extinguishment of Title at the Expiry of Any Limitation Period**

Under this approach, the original owner's title could be extinguished at any of the following times:

- the expiry of the basic two-year limitation period;
- the expiry of the 15-year ultimate limitation period; or
- in light of Recommendation 3 above, the expiry of the two-year good faith purchaser limitation period.

If title is extinguished at the expiry of the basic two-year limitation period, the plaintiff would be deprived of the chance to sue any subsequent converters because he or she would no longer have the requisite right to possession. To some observers, this may be the proper result. Arguably, a plaintiff who chooses not to sue a converter within the two-year basic limitation period should not reasonably expect to retain the right to sue subsequent converters. On the other hand, this approach may be perceived as unduly restrictive of the rights of the original owner. In its final report on *Limitation of Actions*, England's Law Commission expressed its dissatisfaction with this result and amended its recommendation accordingly.[12]

If title is extinguished at the expiry of the 15-year ultimate limitation period, the plaintiff would be deprived of the opportunity of suing any subsequent converters. This appears to be consistent with the philosophy underlying the ultimate limitation period. If a plaintiff can no longer sue any defendant, it may be appropriate that he or she loses title to the chattel at the same time. The extinguishment of title assists in discouraging self-help measures such as recaption after the expiry of the limitation period. However, because the ultimate limitation period runs from the day on which the act or omission took place, and does not depend on discoverability, the plaintiff might lose title to the goods without ever being aware of the conversion.

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[11] New Brunswick Office of the Attorney General, *Commentary on Bill 28: Limitation of Actions Act*, online: <http://www.gnb.ca/legis/bill/pdf/56/3/Limitations-e.pdf> at 7.
[12] The Law Commission, *supra* note 8 at para. 4.65.

If title is extinguished at the expiry of the two-year good faith purchaser limitation period suggested in Recommendation 3, the plaintiff would be deprived of the opportunity of suing any subsequent converters. This is not a satisfactory result. As with the ultimate limitation period, the good faith purchaser limitation is not dependent on discoverability. The plaintiff could therefore lose his or her title without being aware of the conversion, and within a relatively short two-year period.

**(b) Extinguishment of Title at the Expiry of the Basic Two-year Limitation Period or the 15- year Ultimate Limitation Period.**

With this approach, a claimant's title would be extinguished at the expiry of the two-year basic limitation period, or, if no claim is discovered or discoverable, at the expiry of the ultimate 15-year limitation period. This excludes the possibility that title could be extinguished at the expiry of the two-year good faith purchaser limitation period, and could therefore produce a somewhat anomalous result. If the good faith purchaser cannot be sued more than two years after the purchase, he or she may gain a right of possession over the goods. But the original owner may continue to retain title to the goods for up to 15 years from the date of the original conversion. This leaves open the possibility of recaption by the original owner for a period of up to 15 years, and creates some ambiguity in respect of property interests in the chattel.

**(c) Extinguishment of Title at the Expiry of the 15-year Ultimate Limitation Period.**

With this provision, the plaintiff could bring an action for a period of up to 15 years from the date of the first conversion, subject to the two-year basic limitation period as against any particular defendant. The plaintiff would lose both the right to sue and title to the goods at the expiry of the ultimate limitation period, which could assist in preventing self-help measures on the part of the plaintiff.

Under this approach, the plaintiff might lose title to the goods without ever being aware of the conversion. It may also result in the anomalous situation described above in which the plaintiff continues to retain title for up to 15 years from the date of the original conversion, while a defendant who benefits from the basic two-year limitation period or the two-year good faith purchaser limitation period gains rights of possession over the goods.

**(d) No Extinguishment of Title**

A final option is to omit any provision with respect to the extinguishment of title. In modern Canadian limitation legislation, only the New Brunswick Act contains a provision extinguishing title. By no means is extinguishment of title a necessary feature

of limitations legislation. Indeed, it is an exception to the general principle that limitation periods in respect of tort actions deprive the plaintiff of the remedy, but not the right.[13]

However, failing to address the problem of title could create an ambiguous situation in which a plaintiff has no judicial remedy in respect of converted or detained chattel, but continues to have some property rights in the chattel. As observed above, this could encourage self-help on the part of the plaintiff and lead to further litigation.

### (e) The Commission's Recommendation

Overall, the Commission supports the enactment of a provision which would extinguish title at the expiry of the ultimate limitation period. This approach provides some clarity with respect to title while allowing the plaintiff a reasonable opportunity to exercise his or her rights in connection with the converted or detained chattel. The Commission does not favour the extinguishment of title on expiry of the two-year basic limitation period, which in its view, is too restrictive of a claimant's rights.

Although this provision could result in the plaintiff losing title without ever being aware of the original conversion, this result is not inconsistent with the philosophy underlying the adoption of an ultimate limitation period. The extinguishment of title at the expiry of the ultimate limitation period also serves an important function in respect of concurrent claims in conversion and detinue, which is discussed in greater detail below.

**RECOMMENDATION 4**

***The new* Limitations Act *should contain a provision that the plaintiff's title to the converted or detained goods is extinguished on the expiry of the ultimate limitation period, as provided in the draft legislation in Appendix A.***

## 5. Theft-Related Conversions

The Commission does not believe it is necessary to provide special limitations rules in respect of theft-related actions in conversion and detinue. Such provisions would be unique in Canada and risk undermining the goal of uniformity in limitations legislation, as discussed in the Commission's *Limitations* report.[14] They may also add undue complexity to the law. The Commission's proposed section suspending the ultimate limitation period against a defendant who wilfully conceals relevant information from the claimant should provide adequate protection against thieves in the majority of cases.

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[13] A. McGee, *Limitation Periods, 6th ed.* (London: Sweet & Maxwell, 2010) at 247.

[14] Manitoba Law Reform Commission, *Limitations* (Report No. 123, 2010) at 6.

**RECOMMENDATION 5**

***The Commission recommends that no special theft-related provisions be included in the new* Limitations Act.**

## 6. Concurrent Actions in Conversion and Detinue

The rule that the limitation period in detinue does not start to run until a demand for the return of the chattel is refused has the potential to create significant problems in respect of limitations. Courts and commentators alike have remarked that the rule gives plaintiffs an opportunity to control the timing of the cause of action and the running of the limitation period.[15]

This aspect of the tort is particularly troubling in those cases in which an action lies in both detinue and conversion. Frequently, the same set of facts can give rise to actions in both conversion and detinue, with different start dates for limitation purposes. A plaintiff may request the return of converted chattel long after the original conversion, resulting in a separate cause of action in detinue. This is what appears to have occurred in the cases of *Albion Research*[16] and *South Simcoe Railway,*[17] discussed in Chapter 3.

The Commission has considered whether special legislative provisions are an appropriate solution to this problem, and has concluded that they are not.

Professor Klar suggests that: "Where a detinue arises from the breach of a legal obligation, the time for suing in detinue ought to be the same as the time for suing on the basis of that breach."[18] The Commission agrees with this principle in the majority of cases, but does not believe a special legislative provision is necessary to give it effect.

The decisions in *Albion Research* and *South Simcoe Railway* reflect a pragmatic approach to the limitation problems raised by concurrent actions in conversion and detinue. In both cases, the courts found that the plaintiff's claim in conversion was discovered or discoverable more than two years before the statement of claim was filed. The courts did not permit the plaintiffs to proceed with claims in detinue based on a subsequent demand for the return of the chattel. The expiry of the limitation period in respect of conversion effectively barred a subsequent claim in detinue.

In the Commission's view, the reasoning in *Albion* and *South Simcoe Railway* does not adequately recognize that conversion and detinue are indeed two separate and discrete torts. Nonetheless, the Commission agrees with the end result in both cases. Where, as in *Albion* and *South Simcoe Railways*, the basic two-year limitation period in respect of a claim in conversion

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[15] See for example *Musson v. Memorial University of Newfoundland* (2002), 112 A.C.W.S. (3d) 154 (Ont. Sup.Ct.) at para. 92; Cynthia Hawes, *Tortious Interference with Goods in New Zealand: The Law of Conversion, Detinue and Trespass* (Ph.D. thesis, University of Canterbury, 2010) online: University of Canterbury <http://ir.canterbury.ac.nz/bitstream/10092/3834/2/PhD_CHawes.pdf.txt> at 11; L.N. Klar, *Tort Law*, 4th ed. (Scarborough: Thomson Carswell, 2008) at 94.

[16] [1998] 1 F.C. 78 (F.C.T.D.).

[17] 2011 ONSC 1234 (CANLII).

[18] Klar, *supra* note 15 at 94.

has expired, it does not seem reasonable to permit a plaintiff to proceed with an action in detinue against the same defendant.

The difficulty with enacting a legislative provision to achieve this result is that it might not allow for the flexibility to deal with unforeseen cases. As observed in Chapter 2, conversion can occur in a very wide variety of circumstances, and there may well be unforeseen situations in which it would be reasonable to allow a claim in detinue after the basic limitation period in respect of conversion of the chattel had expired.

The elaboration of principles in this regard seems best done through judge-made law, which can be tailored to achieve fairness in individual exceptional cases.

The decisions in *Albion* and *South Simcoe Railways* are both concerned with the expiry of the basic two-year limitation period for a claim in conversion, based on discoverability principles. Different considerations apply in respect of the expiry of the ultimate limitation period for a claim in conversion. The ultimate limitation period expires 15 years after the act or omission which gives rise to a claim in conversion, irrespective of discoverability.

A rule which bars a claim in detinue after the expiry of the ultimate limitation period for the original conversion could arguably produce unfairness in certain, likely rare, circumstances. One could foresee, for example, a case in which a plaintiff is unable to identify a defendant or locate the chattel within the 15-year ultimate limitation period for conversion, only to discover the location of the chattel at a later time. Should such a plaintiff be barred from bringing an action in detinue following a demand and refusal?

A competing consideration is the need to give effect to the ultimate limitation period for claims in conversion. Without a rule to prevent a plaintiff from bringing a claim in detinue after the expiry of the ultimate limitation period for conversion, there is arguably no ultimate limitation period in respect of conversion claims. There would always be the possibility that a plaintiff could bring a claim in detinue against the person in possession of the converted chattel, which effectively undermines the repose function of the ultimate limitation period.

In Recommendation 4 of this report, the Commission has suggested that title to converted goods be extinguished at the expiry of the 15-year ultimate limitation period. This would effectively bar any subsequent claims in detinue in respect of the same chattel because the plaintiff would no longer have the requisite right to possession. As discussed in Chapter 2, there are very few reported decisions pertaining to detinue in Manitoba, and the problem of concurrent actions in conversion and detinue is unlikely to be a genuine issue in many cases. On balance, the Commission believes it is more important to provide for finality in the majority of cases than to legislate for the exceptional case in which it might be reasonable to allow a claim in detinue after the expiry of an ultimate limitation period in conversion. In taking this position, the Commission is comforted by the knowledge that the wilful concealment provision of the new *Limitations Act* may, in some circumstances, provide relief to a plaintiff in this situation.

In light of the Commission's Recommendation 4 respecting extinguishment of title, there is no need to consider any additional special provisions to bar a claim in detinue after the expiry of the ultimate limitation period for the original conversion.

**RECOMMENDATION 6**

***The Commission recommends that no special provision in respect of the limitation period for concurrent actions in conversion and detinue be included in the new* Limitations Act.**

## CHAPTER 6

## LIST OF RECOMMENDATIONS

1. The standard limitation regime recommended in the Commission's *Limitations* Report should apply to actions in respect of converted and wrongfully detained chattel, subject to certain modifications. (p. 22)

2. The new *Limitations Act* should contain a provision that the ultimate limitation period runs from the first date the property is converted or wrongfully detained by any person, as provided in the Draft Legislation in Appendix A. (p. 23)

3. The new *Limitations Act* should contain a provision that no action may be brought against a good faith purchaser of converted or detained goods more than two years after the good faith purchase occurred, as provided in the Draft Legislation in Appendix A. (p. 23)

4. The new *Limitations Act* should contain a provision that the plaintiff's title to the converted or detained goods is extinguished on the expiry of the ultimate limitation period, as provided in the draft legislation in Appendix A. (p. 26)

5. The Commission recommends that no special theft-related provision be included in the new *Limitations Act*. (p. 27)

6. The Commission recommends that no special provision in respect of the limitation period for concurrent actions in conversion and detinue be included in the new *Limitations Act*. (p. 29)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c.L95, signed this 30th day of November, 2011.

**"Original Signed by"**
Cameron Harvey, President

**"Original Signed by"**
John C. Irvine, Commissioner

**"Original Signed by"**
Gerald O. Jewers, Commissioner

**"Original Signed by"**
Perry W. Schulman, Commissioner

## APPENDIX A

## DRAFT LEGISLATION

The Commission's *Limitations* Report of October 2010 includes a Draft *Limitations Act* attached as Appendix A to the Report. The Commission recommends that the Draft *Limitations Act* contain the following amended Section 6:

6(1) Even if the limitation established by section 4 in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of the limitation established by this section.

(2) Subject to subsection (3), no proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

(3) No proceeding shall be commenced in respect of

(a) existing aboriginal and treat rights that are recognized and affirmed in the Constitution Act, 1982; or

(b) an equitable claim by an aboriginal people against the Crown,

after the 30th anniversary of the day on which the act or omission in which the claim is based took place.

(4) No claim arising out of the conversion or wrongful detention of personal property shall be brought, if the defendant is a purchaser for value in good faith, after two years from the day the purchaser purchased the personal property.

Implements Recommendation #3 (page 23)

(5) For the purpose of this section, the day an act or omission on which a claim is based takes place is

(a) in the case of a default in performing a demand obligation, the day on which the default in performance occurs after a demand for performance is made;

(b) in the case of a continuous act or omission, the day on

which the act or omission ceases;

(c) in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs;

(d) in the case of a claim for contribution and indemnity, the day on which the claimant

(i) is served with a claim or a notice that commences an arbitration, or

(ii) incurs liability through a settlement agreement,

in respect of the matter for which contribution or indemnity is sought; and

(e) In the case of a claim arising out of a conversion or wrongful detention of personal property, the day on which the personal property was first converted or wrongfully detained by any person.

Implements Recommendation #2 (page 23)

(6) Clause 5(d) applies whether the right to contribution and indemnity arises in respect of a tort or otherwise.

(7) If the limitation period under this section has expired in respect of a person's claim arising out of a conversion or wrongful detention of personal property, and that person has not recovered possession of the personal property, the title of that person to the personal property is extinguished.

Implements Recommendation #4 (page 26)

## LIMITATIONS OF ACTIONS IN CONVERSION AND DETINUE

## EXECUTIVE SUMMARY

This report originates from the Manitoba Law Reform Commission's *Limitations* report published in October, 2010. In the *Limitations* report, the Commission recommends the adoption of a basic two-year limitation period for all claims running from the date of discovery, and a 15-year ultimate limitation period running from the day on which the act or omission on which the claim is based took place. The Commission deferred making recommendations in respect of actions in conversion and detinue with the intention of issuing a separate report on that subject.

Conversion and detinue are torts which protect a person's possessory interests in personal property against wrongful interference. The torts' characteristics give rise to unique concerns in respect of limitations. This report examines the specific problems associated with limitations of actions in conversion and detinue, including: successive transactions, the protection of good faith purchasers of converted or detained goods from ongoing liability; the effect of the expiry of a limitation period on title to converted or detained goods; limitations and theft-related conversions; and, limitations and concurrent actions in conversion and detinue.

The report reviews and analyzes recent law reform initiatives in respect of limitations of actions in conversion and detinue, and makes recommendations for specific provisions in a new *Limitations Act* to deal with these types of claims. The Commission's recommendations include a provision that the ultimate limitation period should run from the first date the personal property is converted or detained; a provision for a good faith purchaser exception to the ultimate limitation period; and a provision extinguishing title to converted or detained goods at the expiry of the ultimate limitation period. The Commission concludes that special statutory rules are not required to address theft-related conversions or concurrent actions in conversion and detinue.

With this report, the Commission completes its work in respect of a modern *Limitations Act* for Manitoba.

## LA PRESCRIPTION DES ACTIONS POUR DÉTOURNEMENT ET RÉTETNION ILLICITE

## RÉSUMÉ

Ce rapport est tiré du rapport intitulé La Prescription, publié en octobre 2010 par la Commission de Réforme du Droit du Manitoba. Dans le rapport intitulé La Prescription, la Commission recommande l'adoption d'une prescription de base de deux ans à compter de la date de découverte pour toutes les demandes, et d'un délai ultime de prescription de 15 ans à partir de la date d'accomplissement de l'action ou de l'omission sur laquelle la demande est fondée. La Commission a remis à plus tard les recommandations pour ce qui est des actions pour détournement et rétention illicite, dans l'intention de publier un rapport distinct à ce sujet.

Le détournement et la rétention illicite sont des délits qui protègent les intérêts possessoires sur les biens personnels de toute intervention fautive. Les caractéristiques des délits soulèvent des questions uniques en ce qui a trait à la prescription. Ce rapport examine les problèmes précis associés à la prescription des actions pour détournement et rétention illicite, lesquels comprennent : les détournements successifs; la protection contre toute obligation continue des acheteurs de bonne foi de marchandises détournées ou retenues; l'effet d'expiration d'un délai de prescription sur le droit de propriété des marchandises détournées ou retenues; la prescription et les détournements reliés au vol; et, la prescription et les actions concurrentes en matière de détournement et de rétention illicite.

Le rapport examine et analyse les récentes initiatives de réforme du droit en ce qui a trait à la prescription des actions pour détournement et rétention illicite, et émet des recommandations afin que des dispositions particulières traitent de ce type de demandes dans une nouvelle loi sur la prescription. Les recommandations de la Commission incluent des dispositions prévoyant un délai de prescription ultime à partir de la première date à laquelle les biens personnels ont été détournés ou retenus; une exception pour les acheteurs de bonne foi en ce qui concerne le délai ultime de prescription; et une disposition éteignant le titre sur des marchandises détournées ou retenues à l'expiration du délai ultime de prescription. La Commission conclut que des règles juridiques spéciales ne sont pas nécessaires au traitement des détournements liés au vol ou d'actions concurrentes pour détournement et rétention illicite.

Avec ce rapport, la Commission termine ses travaux pour ce qui est de l'établissement d'une loi sur la prescription moderne pour le Manitoba.